INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	1
Statute involved	2
Statement	2
Argument	4
Conclusion	7
Appendix	8

CITATIONS

Cases:	
American Smelting Co. v. *United States*, 259 U. S. 75	4, 5
Hartsville Oil Mill v. *United States*, 271 U. S. 43	6
Spier Aircraft Corporation, In re, 137 F. 2d 736, certiorari denied, 321 U. S. 770	5
United States v. *Carver*, 278 U. S. 294	4, 5
Statute:	
Act of October 16, 1941, 55 Stat. 742 (50 U. S. C. App. (1940 ed., Supp. V) 721)	8

855029—49

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 218

THE P. DOUGHERTY COMPANY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Claims (R. 13–17), is reported at 83 F. Supp. 688.

JURISDICTION

The judgment of the Court of Claims was entered on May 2, 1949 (R. 17). The petition for a writ of certiorari was filed on July 29, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. 1255 (1).

QUESTION PRESENTED

Whether, on the undisputed facts as found by the Court of Claims, the property of the petitioner was "taken" by the United States.

STATUTE INVOLVED

The pertinent provisions of the statute under which petitioner's barges might have been requisitioned by the United States are set forth in the Appendix, *infra*, pp. 8–9.

STATEMENT

Petitioner brought suit in the Court of Claims on February 16, 1948 (R. 1–5), for $142,500.00, the claimed value of three barges which it alleged had been taken by the United States "under threat of requisition and seizure" (par. 11. R. 4). The material facts, as found by the Court of Claims, are substantially as follows:

In 1942, petitioner was the owner of three wooden barges which had been lying idle at anchor in the James River since 1930 (R. 6). With the outbreak of war, although barges were in great demand, petitioner at that time was financially unable to recondition the barges (R. 7). The War Shipping Administration, in the early years of the war, conducted a survey of laid-up tonnage at the various ports of the United States, with the purpose in mind of placing in commission all vessels which could be used even for limited service (R. 7). As a result of the survey the War Shipping Administration, through a committee of experienced ship operators, decided that petitioner's barges, together with many other vessels, were beyond repair from the standpoint of economy and scarcity of materials. It accord-

ingly turned over to the War Production Board, a list including these vessels for salvage action. (R. 7–8.) A regional salvage officer of the War Production Board, Mr. Ewing, urged petitioner to scrap the vessels (R. 9). Petitioner at first said it intended to overhaul the barges, but it needed financial aid from the Government to do so (R. 10). After a number of conferences, the War Production Board official procured an offer from a private concern, the Standard Steam Winch & Hoist Company, for bells, anchors, pumps and other equipment on the barges. The War Production Board official forwarded this offer to petitioner. (R. 10–11.) Petitioner thereupon engaged in direct correspondence with the Winch & Hoist Company. Petitioner tried to obtain an offer for the equipment separately and another for the barges with the equipment, but the Winch & Hoist Company expressed a willingness to purchase only the barges with the equipment (R. 11–12). Inasmuch as petitioner recognized that the hulls without the equipment would be worthless and would be a continuing burden to it, it decided to accept the offer (R. 12). It thereupon sold the barges to one Broaddus, a nominee of the Winch & Hoist Company, for the sum of $2,500 each (R. 12).

The Court of Claims, in disposing of petitioner's contention that its vessels were sold under threat of requisition of the equipment, that this threat constituted a taking by the United States,

and that the United States is therefore liable for just compensation for the value of the vessels and the equipment (Pet. 5), stated (R. 16–17):

> The plaintiff could have awaited requisition and claimed the value of the property taken. It chose not to do so, but rather to dispose of the property in the market. Having taken this course it may not, in the circumstances of this case, claim that its property was taken by the defendant.

ARGUMENT

The petitioner's case hangs upon the tenuous theory that a sale of property under threat of requisition is a taking of property by the United States. But petitioner's contention has already been answered in *United States* v. *Carver,* 278 U. S. 294, and *American Smelting Co.* v. *United States,* 259 U. S. 75, where this Court squarely held that a threat of requisition is not a taking of property by the United States.

In the *Carver* case, a ship operator gave up a charter for ore freight and, under threat of requisition of its vessel to carry the grain, accepted a less profitable charter to carry grain offered by the United States Food Administration Grain Corporation. But this pressure did not amount to a requisition because, this Court said, the shipowner accepted "the wheat charter for the very purpose of anticipating and preventing the taking over of the vessel by the Government," 278 U. S. at page 299. In the *American Smelting Company*

case, it was held that a copper producer could not claim the price for requisitioned copper, when it had agreed to a lower price in a contract to sell the copper to an agency of the United States. There was no taking even though, as the Court observed, "it may be true that the claimant was yielding to the [requisition] statute in a general way * * *," 259 U. S. at page 78.

Both of the foregoing cases were decided under World War I requisition statutes, which were closely analogous to the requisition statute involved in the case at bar (Appendix, *infra*, pp. 8–9). Petitioner's claim is not even as strong as the claims rejected in the *Carver* and *American Smelting* cases, since in both those cases the claimants sold their product to an agency of the United States, while here the petitioner sold his property to a private person.

The rule that a sale under threat of requisition is not a taking is supported by reason as well as authority. The owner of property is, of course, at liberty to refuse to sell either to the Government or anyone else. The very purpose of the requisition statute is to give the Government the power to acquire war supplies which it cannot obtain by purchase. At the same time, the statute protects property rights of the owner under the Fifth Amendment by providing that any taking must be on terms of just compensation. *In re Spier Aircraft Corporation*, 137 F. 2d 736,

740 (C. A. 3), certiorari denied, 321 U. S. 770.[1] The statute itself sets forth a definite procedure whereby an owner of requisitioned property, who is dissatisfied with a price offered by the Government, can have the fair value of the property determined judicially by resort either to the Court of Claims or to an appropriate district court. Petitioner did not invoke this procedure; it undertook instead to sell the property to a private person; and it cannot now set aside the bargain.

Nor does the threat of requisition constitute legal duress sufficient to set aside a contract, since there are adequate legal remedies available to protect the owners' constitutional rights. *Hartsville Oil Mill* v. *United States*, 271 U. S. 43, 48–49. As a result of the mere existence of the requisition statute every wartime sale to the Government is made under a potential threat of requisition: if a satisfactory bargain cannot be reached, the Government may requisition and the seller may secure just compensation. If the threat of requisition were held to be a taking, then nearly every sale of wartime supplies to the Government would be a taking, and each seller could repudiate his bargained price if he thought he could obtain a higher one under a claim of just compensation for a taking.

---

[1] There can, of course, be a taking which is outside of the requisition statute and protected by the Fifth Amendment, but not in a case where the taking is claimed on account of a threat of requisition.

Petitioner presents the case as if its claim were one for an implied taking resulting from the destruction of its property by some action of the United States; specifically it urges that the value of the hulls of its barges was destroyed when the equipment was taken. Petitioner cites cases involving the taking of property by destruction and the liability for the value of a part not taken which is damaged by a partial taking (Pet. 6–9). But this argument is beside the point as there was no taking of any part of petitioner's property. Petitioner gave up its interest in the barges, including their equipment, by a voluntary sale to a private person. It cannot now convert the sale into a taking on the theory that the United States took the property by threatening to take it.

CONCLUSION

The decision below is clearly correct, there exists no conflict, and the petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

H. G. MORISON,
Assistant Attorney General.

PAUL A. SWEENEY,
JOSEPH KOVNER,
Attorneys.

OCTOBER 1949.

APPENDIX

Act of October 16, 1941, 55 Stat. 742, as amended (50 U. S. C. App. (1940 ed., Supp. III) 721) provided as follows:

> whenever the President, during the national emergency declared by the President on May 27, 1941, but not later than June 30, 1945, determines that (1) the use of any military or naval equipment, supplies, or munitions, or component parts thereof, or machinery, tools, or materials necessary for the manufacture, servicing, or operation of such equipment, supplies, or munitions is needed for the defense of the United States; (2) such need is immediate and impending and such as will not admit of delay or resort to any other source of supply; and (3) all other means of obtaining the use of such property for the defense of the United States upon fair and reasonable terms have been exhausted, he is authorized to requisition such property for the defense of the United States upon the payment of fair and just compensation for such property to be determined as hereinafter provided, and to dispose of such property in such manner as he may determine is necessary for the defense of the United States. The President shall determine the amount of the fair and just compensation to be paid for any property requisitioned and taken over pursuant to this Act and the fair value of any property returned under section 2 of this Act, but each such deter-

mination shall be made as of the time it is requisitioned or returned, as the case may be, in accordance with the provision for just compensation in the fifth amendment to the Constitution of the United States. If, upon any such requisition of property, the person entitled to receive the amount so determined by the President as the fair and just compensation for the property is unwilling to accept the same as full and complete compensation for such property he shall be paid 50 per centum of such amount and shall be entitled to sue the United States in the Court of Claims or in any district court of the United States in the manner provided by sections 24 (20) and 145 of the Judicial Code (U. S. C., 1934 ed., title 28, secs. 41 (20) and 250) for an additional amount which, when added to the amount so paid to him, he considers to be fair and just compensation for such property. Such courts shall also have power to determine in an appropriate proceeding any questions that may arise with respect to the amount of the fair value to be paid upon the return of any property under section 2 of this Act, regardless of the amount in controversy in any such proceeding.

* * * * *

U. S. GOVERNMENT PRINTING OFFICE: 1940